

STATE OF MICHIGAN
COURT OF APPEALS

FIRST LADY, INC., a/k/a FIRST LADY
FASHION, and MARIA'S COLLECTIONS, INC.,

UNPUBLISHED
November 1, 2002

Plaintiffs-Counterdefendants-
Appellants,

v

DERO ENTERPRISES, INC.,

No. 228480
Oakland Circuit Court
LC No. 98-010506-CZ

Defendant-Counterplaintiff-
Appellee.

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment for defendant entered after a bench trial. The court found no cause of action with regard to plaintiffs' complaint against defendant. The court also awarded defendant \$7,138.45 on its counter-complaint against plaintiff First Lady, Inc., and \$4,532.28 on its counter-complaint against plaintiff Maria's Collections, Inc. We affirm.

I. Facts

Defendant is a New York company that manufactures leather clothing. It maintains a merchandise showroom in New York City. Plaintiffs First Lady, Inc. ("First Lady"), also known as First Lady Fashion, and Maria's Collections, Inc. ("Maria's") are two related Michigan companies that manufacture dresses and sell other clothing. They arranged to show their products in a corner of defendant's New York showroom, staffed by an employee of plaintiffs. They paid defendant \$800 a month for the space on a month-to-month lease and sent samples to defendant for display. Plaintiffs later canceled the lease.¹

Maria's claimed that defendant kept its showroom samples, and it therefore sued for conversion. Defendant stated that it had always been willing to return the samples if Maria's or First Lady would pay the freight charges and that it did not commit conversion by holding the samples pending payment of outstanding indebtedness.

¹ As noted *infra*, the parties dispute the effective date of the cancellation.

First Lady ordered two custom-made leather coats from defendant to resell to its own customers. First Lady claimed that the order was accepted but that the custom-made coats were not delivered as promised. Defendant claimed that it refused to accept the order until prior charges, totaling \$6,386.90, were paid. First Lady sued defendant for lost profits arising out of the unfulfilled order.

Defendant countersued plaintiffs for unpaid showroom rent. Plaintiffs argued that the lease was terminated in November 1997, when defendant did not accept a request to reduce the rental rate by half. Defendant claimed that the lease continued, unpaid, until March 1998, when plaintiffs canceled the lease in writing. Defendant also countersued for the unpaid open account of \$6,386.90 with First Lady. First Lady admitted this indebtedness.

The circuit court, sitting as the trier of fact, found that the rental agreement was not modified by plaintiffs' attempt to reduce the amount of the rent. The court ruled that Maria's owed unpaid rent through March 1998. The court further ruled that there was no conversion of the samples because defendant offered to return the dresses upon payment of shipping costs, but Maria's failed to pay and defendant then stored the samples. The court awarded defendant its costs associated with inventorying and removing the samples. The court also found that, although the parties had a course of dealing in the past, defendant never agreed to accept First Lady's order for the leather coats because of unpaid invoices. Finally, the court awarded judgment to defendant for the undisputed unpaid open account.

II. Surprise Witness

Plaintiffs argue that the trial court erred by permitting defendant's controller, Tom Goldstein, to testify at trial, because Goldstein had not been identified in answers to plaintiffs' interrogatories as a person having knowledge of the facts in this case. We review this issue for an abuse of discretion. *Harper v National Shoes, Inc*, 98 Mich App 353, 356; 296 NW2d 1 (1979).

We discern no abuse of discretion. Indeed, Goldstein signed an affidavit filed in opposition to plaintiff's motion for summary disposition; in this affidavit, Goldstein noted his competence to testify to many facts regarding the parties' transaction based on personal knowledge and business records. In addition, Goldstein was listed on defendant's witness list, plaintiffs' witness list, and plaintiffs' amended witness list. Under these circumstances, plaintiffs cannot legitimately claim that they were surprised when defendant presented Goldstein's testimony, and no abuse of discretion occurred with respect to the trial court's ruling. See, generally, *id.* at 355-356.

III. Newly-discovered Evidence

Next, plaintiffs argue the trial court should have granted a new trial because of newly-discovered evidence. See MCR 2.611(A)(1)(f). We review this issue, too, for an abuse of discretion. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985).

Plaintiffs claim that an affidavit from a former employee of defendant presented after trial demonstrated that defendant offered perjured testimony. The affidavit also alleged that some of plaintiffs' dress samples were sold by defendant, which would undermine the trial

court's finding that defendant was willing to return those samples to plaintiffs but for a dispute over shipping expenses.

To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have produced the evidence at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

The former employee, who served as showroom manager and salesperson for defendant, should have been known to plaintiffs' employee working in the same location. Although the affiant was not disclosed in answers to interrogatories, with reasonable diligence plaintiffs could have ascertained her identity from their own employee. Accordingly, we conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial. *Id.*

IV. Conversion

Next, plaintiffs argue that the trial court made clearly erroneous findings of fact when it determined that defendant had not committed conversion with respect to plaintiffs' dress samples. Plaintiffs claim that, contrary to the trial court's findings, they did indeed agree to pay for the shipping costs upon delivery of the dress samples. We find no clear error. See MCR 2.613(C) (findings of fact are reviewed for clear error).

Paperwork exchanged by the parties in March 1998 showed that plaintiffs agreed to pay "COD cashier's check" for the return of their samples. However, plaintiffs later indicated that it would provide a company check, a less financially-reliable form of payment. Given the outstanding indebtedness existing among the parties, defendant could reasonably insist on a reliable form of payment. Because plaintiffs failed to agree to payment by cashier's check, defendant justifiably refrained from shipping at its own expense, and we discern no clear error with respect to the trial court's ruling.

V. Breach of Contract

Next, plaintiffs challenge the court's finding that defendant did not breach a contract in failing to deliver the two custom-made leather coats. Again, we review findings of fact for clear error. MCL 2.613(C). To the extent this issue involves questions of law, our review is de novo. See *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

Plaintiffs contend that the trial court committed error requiring reversal with respect to its findings because (1) defendant admitted in its answer to the complaint that a contract to deliver the two leather coats existed and (2) the course of dealings among the parties demonstrated the existence of such a contract. We disagree that an error requiring reversal occurred.

Although defendant admitted in its answer that a contract between the parties existed, there was no indication that defendant was obligated to supply the coats without first receiving payment from First Lady. As noted in MCL 440.2511(1), "unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery." There was no evidence that First Lady paid for the coats and thereby triggered defendant's obligation to deliver

them. Plaintiffs argue that because the parties had always operated on credit in the past, defendant was obligated to ship the coats to them and receive payment later. This argument is disingenuous, considering First Lady's admission that it had an outstanding debt of several thousand dollars with defendant. Defendant was not obligated to extend further credit to plaintiffs when past debts still had not been paid.

The trial court did not clearly err in finding for defendant on this issue. While the trial court ruled that no contract existed between the parties (instead of ruling that plaintiffs failed to satisfy a condition for shipment), we will not reverse a ruling if a trial court reached the correct result for the wrong reason. *Draws v Levin*, 332 Mich 447, 454; 52 NW2d 180 (1952).

VI

Finally, plaintiffs argue that the trial court erred by concluding that plaintiffs canceled the showroom lease in March 1998 instead of November 1997. We find no clear error. MCR 2.613(C).

Plaintiffs rely on a November 5, 1997, letter in which they informed defendant that they could only pay \$400 a month instead of \$800 a month to lease the showroom space. On appeal, plaintiffs suggest that this letter essentially terminated the lease agreement. However, the November 5, 1997, letter did *not* indicate that plaintiffs were terminating the lease. Instead, the letter stated that defendant could terminate the lease at any time defendant wanted, but that plaintiffs believed it would be to defendant's benefit to continue the relationship. Given this fact, the trial court did not clearly err in finding that the rental agreement was not terminated in November 1997. While an employee of plaintiff testified at trial that he unambiguously terminated the lease in November 1997 via a telephone conversation with an employee of defendant, the trial court, the arbiter of credibility in this bench trial, see MCR 2.613(C), was free to conclude otherwise in light of the other circumstances, like the existence and substance of the November 5, 1997 letter and the existence of a March 13, 1998 letter in which defendant stated that plaintiffs agreed to pay for several months' rental arrears at \$800 a month. No clear error occurred.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Patrick M. Meter